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No. [illegible].

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AMBROSE BADILLO CAUDILLO, JOE ROMERO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF OF APPELLEE UNITED STATES OF AMERICA.

LAUGHLIN E. WATERS,
United States Attorney,

LLOYD F. DUNN,
Assistant U. S. Attorney,
Chief, Criminal Division,

REMBERT T. BROWN,
Assistant U. S. Attorney,

600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

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BRIEF OF APPELLEE UNITED STATES OF AMERICA.

Basis of Jurisdiction.

This is a criminal action. Jurisdiction of the District Court was invoked under 18 U. S. C. §3231. The subject four-count indictment was returned on July 10, 1957. Defendant Caudillo was charged in counts one, two and three with violating 21 U. S. C. §176(a). Defendant Romero was charged in counts three and four with violating the same statute.

[R. 3*] 21 U. S. C. §176(a) reads as follows:

> "Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United

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*References to the Transcript of Record will be prefixed with the letter "R." References to the Reporter's Transcript of Proceedings will be prefixed with the letters "Tr."

States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

"As used in this subsection, the term 'marihuana' has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954.

"For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954."

On July 16, 1957, each of the defendants pleaded not guilty to all of the respective counts of the indictment in which he was charged [Tr. 8]. After a jury trial defendant Caudillo was adjudged guilty on Counts One, Two and Three of the indictment and was sentenced to imprison-

ment for a period of five years on Count One, a further period of five years on Count Two consecutive with the sentence imposed in Count One, and a further period of five years on Count Three to be served concurrently with the sentence imposed on Counts One and Two. Defendant Romero was adjudged guilty on Counts Three and Four and was sentenced to imprisonment for a period of five years on Count Three, and a further period of five years on Count Four consecutive with the sentence imposed in Count Three. Judgment was entered on August 19, 1957 [R. 7-8]. Notice of Appeal was filed by each defendant on August 30, 1957 [R. 14]. This Court has jurisdiction under Title 28, U. S. Code, Section 1291.

Statement of the Case.

Indictment. The indictment is in four counts which charge as follows:

> COUNT ONE: On or about June 12, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Ambrose Badillo Caudillo, with intent to defraud the United States and after importation, did knowingly and unlawfully sell and facilitate the sale of approximately 2 pounds of bulk marihuana to Paul Gutierrez, which said marihuana, as the defendant then and there well knew, had been imported into the United States contrary to law.
>
> COUNT TWO: On or about June 17, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Ambrose Badillo Caudillo, with intent to defraud the United States and after importation, did know-

ingly and unlawfully sell and facilitate the sale of approximately 2 pounds of bulk marihuana to Paul Gutierrez, which said marihuana, as the defendant then and there well knew, had been imported into the United States contrary to law.

COUNT THREE: On or about June 24, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Ambrose Badillo Caudillo and Joe Romero, with intent to defraud the United States, did knowingly receive, conceal, and facilitate the transportation and concealment of certain merchandise, namely: approximately 2 pounds of bulk marihuana, which said merchandise, as the defendants then and there well knew, theretofore had been imported and brought into the United States contrary to law.

COUNT FOUR: On or about June 24, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Joe Romero, with intent to defraud the United States, did knowingly, receive, conceal, and facilitate the transportation and concealment of certain merchandise, namely: approximately 4 ounces of bulk marihuana, which said merchandise, as the defendant then and there well knew, theretofore had been imported and brought into the United States contrary to law.

Evidence. The evidence adduced at the trial showed the following:

(1) With regard to Count One, that on June 12, 1957, defendant Caudillo sold to Los Angeles Deputy Sheriff Paul Gutierrez approximately 2 pounds of bulk marihuana for the sum of $150.00. The sale took place in the vicinity

of the intersection of 3rd and Eastman Streets, Los Angeles, California.

(2) With regard to Count Two that on June 17, 1957, defendant Caudillo sold to Deputy Sheriff Paul Gutierrez approximately 2 pounds of bulk marihuana for the sum of $150.00. The sale took place in the "400" block No. Dangler St., Los Angeles, California.

(3) With regard to Count Three that on June 24, 1957, in the "400" block, No. Dangler Street, Los Angeles, California defendant Caudillo again met with Deputy Sheriff Paul Gutierrez and agreed to sell approximately 2 pounds of bulk marihuana to him. Defendant Caudillo was then paid for the marihuana and promised delivery thereof later that night at the same location. After that conversation took place, defendant Caudillo left the location by automobile, being followed by several other members of the Los Angeles County Sheriff's Office. Shortly thereafter, defendant Caudillo picked up defendant Romero and proceeded by automobile to a location on Raynol Street, Los Angeles, where they met two other men, one with a duffle bag and one carrying a shopping bag. The man carrying the shopping bag removed two small brown paper bags therefrom and handed them to defendant Romero. Defendant Romero was then seen placing the two brown paper bags in the trunk of the car in which he and defendant Caudillo were riding. Both defendants then proceeded in the automobile to the vicinity of Esmeraldo and Huntington Streets, Los Angeles where they were intercepted and placed under arrest. During a search incident

to the arrest the aforementioned two brown paper bags were retrieved from the trunk of the automobile in which defendants Caudillo and Romero were riding. Each bag was found to contain approximately one pound of bulk marihuana.

(4) With regard to Count Four, at the time of the above mentioned arrest Romero voluntarily disclosed to the arresting officers the fact that he had a small supply of marihuana at his residence. The following morning, three members of the Los Angeles County Sheriff's Office proceeded with defendant Romero to his residence, 402 S. Fetterley Street, Los Angeles, where defendant Romero invited them to enter, whereupon he retrieved from a shelf in a bedroom closet in the presence of the accompanying officers, three small paper bags containing approximately 4 ounces of bulk marihuana which he surrendered to the officers.

Relative to the geographical origin of the marihuana involved herein, Mr. Beckner, Narcotic Inspector for the State of California, upon inspection of a portion of the subject marihuana [Ex. 3-B], testified that it appeared to be what he described as the "tops" of the plant [Tr. 223]. He then examined another portion of the subject marihuana [Ex. 4-B] and stated that it contained a "flowering top" [Tr. 224].

Mr. Beckner also testified that during the last 20 years the growth of marihuana has declined throughout California [Tr. 226, 277]; that marihuana plants grown in California are usually stripped before they reach maturity

[Tr. 228]; that huge quantities of marihuana are grown in Mexico [Tr. 231]; that the "flowering top" ordinarily appears only in mature plants [Tr. 240]; that a marihuana plant which has grown to maturity is rarely encountered in California [Tr. 240].

At the conclusion of the testimony, the court instructed the jury, *inter alia* [Tr. 380-381].

> "The marihuana must be proved beyond a reasonable doubt and to a moral certainty to have been imported or brought into the United States contrary to law and it must be so proved that each defendant knew that as to the marihuana involved in the respective counts concerning each defendant."
>
> "In this connection, Section 176(a) of Title 21 of the United States Code has the following to say:
>
> " 'Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.'
>
> "The statute just read does not change the fundamental rule and was not intended to change the fundamental rule that the defendant is presumed to be innocent until proven guilty beyond a reasonable doubt. Nor does it impose a defendant the burden of producing proof that the marihuana was unlawfully imported, or any other evidence. For that matter, as previously stated, the burden is also on the prosecution to prove guilt beyond a reasonable doubt.
>
> "What this statute does do is to create an inference in favor of the United States. If you, the jury,

should find from the evidence beyond a reasonable doubt and to a moral certainty that there was possession, as that term will be defined to you on the part of the defendant as to the respective count in which he might be charged, such possession permits, but does not compel, you to draw the inference that the marihuana was imported or brought into the United States contrary to law and that such defendant knew it.

"As against that inference there is a possible contrary inference that the marihuana was not imported contrary to law which you may reach from a consideration of the whole evidence, including the evidence that marihuana grows in this country and elsewhere in California and the southwestern states of the United States and all of the other evidence relating to its growth."

Questions Presented.

(1) Is the statutory presumption relative to the origin of the marihuana constitutional?

(2) Was the presumption rebutted by other evidence to the contrary?

ARGUMENT.

The Validity of a Statutory Presumption Depends Upon Whether There Is a Rational Connection Between the Fact Presumed and the Fact to Be Proved.

In *Mobile, J. & K. C. R. R. v. Turnipseed,* 219 U. S. 35, the constitutionality of Section 1985 of the Mississippi Code of 1906 was attacked. That section reads as follows:

> "Injury to Persons or Property by railroads *prima facie* evidence of Want of Skill, etc.,—In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotive or cars of such company shall be *prima facie* evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury. This section shall also apply to passengers and employees of railroad companies."

In upholding the validity of the foregoing presumption the Supreme Court said in the *Mobile* case, at page 42:

> "The law of evidence is full of presumptions either of fact or law. The former are, of course, disputable and the strength of any inference of one fact from proof of another depends upon the generality of experience upon which it is founded.
>
> "Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue is but to enact a rule of evidence and quite within the general power of government. Statutes National and state, dealing with such methods of proof both civil and criminal cases abound, and the decisions upholding them are numerous."

On page 43 of the *Mobile* case the Supreme Court goes on to state:

> "That a legislative presumption of one fact from another may not constitute denial of due process of law or denial of the equal protection of the law it is *only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed and that the inference of one fact from proof of another shall not be so unreasonable as to be purely arbitrary mandate. . . .*
>
> "If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him." (Emphasis added.)

Other cases of like import are:

Luria v. United States, 231 U. S. 9, 26;

Fong Yue Ting v. United States, 149 U. S. 698, 729;

Adams v. New York, 192 U. S. 585, 599;

Bailey v. Alabama, 219 U. S. 219;

Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 81;

Reitler v. Harris, 223 U. S. 437, 441.

The Court of Appeals for the 9th Circuit had occasion to pass upon the question of the validity of a statutory presumption in *Casey v. United States,* 20 F. 2d 752. That case involved the validity of a presumption contained in §1 of the act of December 17, 1914, which made the purchase of opium and derivatives unlawful except in and

from the original package and the absence of the required stamps was deemed to be *prima facie* evidence of a violation of that section by the person in whose possession the opium is found. The defendant in the *Casey* case was convicted of the possession of 3 and 4/10 grains of morphine not in or from the original stamped package. The Court of Appeals upheld the conviction and the validity of the aforesaid statutory presumption. The case was appealed to the United States Supreme Court which upheld the conviction.

Casey v. United States, 276 U. S. 413.

The Supreme Court, speaking through Mr. Justice Holmes, said at page 418:

> "With regard to the presumption of purchase of a thing manifestly not produced by the possessor, there is a 'rational connection between the fact proved and the ultimate fact presumed.' *Luria v. United States,* 231 U. S. 9, 25; *Yee Hem v. United States,* 268 U. S. 178, 183. Furthermore, there are presumptions that are not evidence in a proper sense but simply regulations of the burden of proof. *Greer v. United States,* 245 U. S. 559. The statute here talks of prima facie evidence but it means only that the burden shall be upon the party found in possession to explain and justify it when accused of the crime that the statute creates. 4 Wigmore, Evidence Section 2494. It is consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the Government. 4 Wigmore, Evidence Section 2486."

The holding of the Supreme Court in the *Casey* case is that if a presumption is a rebuttable one as distinguished

from a conclusive presumption it does not constitute a denial of due process since it is not conclusive of the rights of the person against whom it is raised.

Section 176(a) under which defendants Caudillo and Romero were convicted was enacted as part of the Marihuana Control Act of 1956 (Public Law 728), on July 18, 1956. Prior to the enactment of the Marihuana Control Act of 1956, hearings on the narcotics problem were held throughout the Country by the Senate Judiciary Subcommittee on Improvements in the Federal Criminal Code. Such hearings were held in Los Angeles on November 14-18, 1955. During those hearings testimony was taken and reports were submitted by many leading authorities in the field of narcotic enforcement and control a full report of the hearings held in Los Angeles is contained in "Hearings Held in Los Angeles Before the Subcommittee on Improvements in the Federal Criminal Code of the Committee on the Judiciary, United States Senate, November 14-18, 1955."

On page 4125 thereof the report states, "The chief source of marihuana for the illicit market is outside the United States, allegedly in Mexico."

Attached to said report as Exhibit 7 is a dissertation entitled "Narcotics, Their Legitimate and Illicit Use," by Walter R. Creighton, Chief, Bureau of Narcotic Enforcement, Department of Justice, State of California.

On page 4167, Mr. Creighton states:

> "A considerable amount of marihuana is continuously being smuggled into this country from Mexico —in fact the bulk of the marihuana seizures by the United States Customs has been on the Mexican border where there has been a continuous stream of the drug, both in bulk and in cigarettes from various localities south of the border."

The findings of the Senate Subcommittee show the rational basis for the presumption of importation of marihuana into the United States. The trial judge in the subject case specifically instructed the jury that the possession of marihuana by the defendants *"permits, but does not compel,* you to draw the inference that the marihuana was imported or brought into the United States contrary to law and that such defendant knew it" [Tr. 381; emphasis added]. The Supreme Court held in *Mobile, J. & K. C. R. R. v. Turnipseed, supra,* that such a rebuttable presumption constitutes but a rule of evidence and as such in no wise deprives the defendant of due process of law. As the Supreme Court pointed out in the *Mobile* case, on page 43:

> "If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either Criminal or Civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

Such opportunity was afforded to the defendants in the present case and witnesses were in fact called in their behalf relative to the question of importation. The jury considered all the evidence and decided against the defendants.

It is submitted that the evidence offered by the defendants showed that the subject marihuana in all probability was imported into California, rather than to the contrary. This is shown by the testimony of defendants' witness, Mr. Beckner, Narcotic Inspector for the State of California, that the subject marihuana contained a "flowering top" [Tr. 224]; that the "flowering top" ordinarily ap-

pears only in mature plants [Tr. 240]; and that a marihuana plant which has grown to maturity is rarely encountered in California [Tr. 240].

Conclusion.

The subject presumption, as shown by the testimony during the trial herein and the findings of the Senate Judiciary Subcommittee, is clearly not arbitrary. Such presumption, being rebuttable, constitutes but a rule of evidence and does not deprive a defendant of due process of law. Evidence relative to the source of the subject marihuana was introduced by the defendants. The jury was carefully instructed that possession of marihuana by the defendants *permitted*, but did not *compel* it to draw the inference that the marihuana was imported contrary to law and that defendants knew it. The jury was further instructed that in reaching its decision it must consider all the evidence in the case. We must assume that it did so.

There is no basis for the defendants' claim that they have been deprived of due process of law, and the judgment of the trial court must, therefore, stand.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

LLOYD F. DUNN,
Assistant U. S. Attorney,
Chief, Criminal Division,

REMBERT T. BROWN,
Assistant U. S. Attorney,

Attorneys for Appellee.